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No. 86-23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BARBARA J. GARVIN, JAMES EDWARD GARVIN,
Petitioners,

v.

ALUMAX OF SOUTH CAROLINA, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Respondent feels that the Question Presented in this case is properly stated as follows:

> Does the Longshoremen's and Harbor Workers' Compensation Act preempt state-created immunity for statutory employers in suits against land-based defendants, arising out of accidents occurring on land?

AFFILIATED ENTITIES

The parent company of Respondent is Alumax Inc., a Delaware corporation. Alumax Inc. is owned by Amax Inc., a New York corporation; Mitsui & Co. (U.S.A.), Inc., a New York corporation; and Nippon Steel, U.S.A., Inc., a New York corporation.

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BARBARA J. GARVIN,
JAMES EDWARD GARVIN,

Petitioners,

v.

ALUMAX OF SOUTH CAROLINA, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The respondent, Alumax of South Carolina, Inc. (Alumax), respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 787 F.2d 910 (4th Cir. 1986).

STATUTES

Alumax lists the following statutes in addition to those cited by Petitioners:

S.C. CODE ANN. §42-1-310 (1976):

Every employer and employee, except as stated in this chapter, shall be presumed to have accepted the provisions of this Title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner provided in §42-1-340.

S.C. CODE ANN. §42-1-400 (1976):

When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the

execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. CODE ANN. §42-1-540 (1976):

The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

STATEMENT OF THE CASE

This is a products liability/negligence personal injury action. James Edward Garvin, an electrician, was injured on March 25, 1981, when he allegedly came into contact with an energized electrical junction box while performing preventive maintenance on a machine known as a ship unloader. The ship unloader is located on a pier. There was no ship in port at the time of Garvin's injury.

Alumax is an importer of alumina ore, which it converts into aluminum. It is a joint lessee of a terminal near Charleston, South Carolina, for the unloading of ocean-going vessels and is the owner of the alumina ore unloading machine installed on the pier.

Alumax has contracted for Lemm Corporation-Operations, Garvin's immediate employer to operate the terminal, and Lemm is responsible for the operation and maintenance of the unloading machine. Lemm procured worker's compensation insurance, as it was contractually required to do, but the

premium costs were treated as costs of operation that Alumax paid.

Garvin can receive compensation under either the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (LHWCA) or the South Carolina Workers' Compensation Law, S.C. CODE ANN. § 42-1-10 et seq. (1976). He has chosen to receive his compensation under the LHWCA.

Garvin filed suit against the firms that allegedly designed and manufactured the unloader and some of its component parts and against Alumax as contractor-owner of the machine. Alumax had contracted with Garvin's immediate employer for operation and maintenance of the unloader.

Alumax filed a motion to dismiss on the ground that it was a statutory employer of Garvin, and was therefore immune from Garvin's common law tort action under the South Carolina Workers' Compensation Law. The District Court denied the motion. The Fourth Circuit reversed, holding that Alumax is entitled to the immunity conferred upon it

by South Carolina law. The Fourth Circuit also denied the plaintiffs' petition for rehearing en banc.

REASONS FOR DENYING THE WRIT

SUMMARY

The Fourth Circuit correctly held that the LHWCA does not preempt state-created immunity for a statutory employer in a tort suit against a land-based defendant, arising out of an accident which occurred on land within the State of South Carolina. Such a suit is governed by the substantive law of South Carolina. The basis of the Fourth Circuit's holding is as follows:

> When application of the [LHWCA] was moved inland to supplement state workmen's compensation statutes without displacing them, a third party claim under state law by a recipient of benefits under the LHWCA was not converted into a maritime claim. Its scope, including available defenses, is governed by state law . . . .

> The South Carolina rule of immunity of a contractor in the position of Alumax is different from that under the LHWCA, but not in conflict with it, for Congress has not purported to prescribe the immunity rules to be applied by states in actions brought upon state law claims. The federal immunity rule is to be applied when the third party claim is a federal claim; when the third party claim is a state law claim, the immunity rules of that state are to be applied. The federal and state statutes are readily harmonized, and each may function in its own sphere without interference with the other.

(Petition for Certiorari, pp. 29A-31A).

The decision of the Fourth Circuit, which is set forth in Appendix A to the petition, contains a full and complete discussion of the contentions of the parties and correctly sets forth the law applicable thereto.

The decision of the Fourth Circuit follows the holdings of this Court in Sun Ship, Inc. v. Commonwealth of Pennsylvania, 447 U.S. 715, reh'g denied, 448 U.S. 916 (1980), and Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), reh'g denied, 404 U.S. 1064 (1972), and its own prior decision in Holland v. Sea-Land Service, 655 F.2d 556 (4th Cir. 1981), in which this Court denied certiorari, 455 U.S. 919 (1982). The Fourth Circuit properly concluded that no direct conflict exists between the LHWCA and state law under the facts of the present case and that the LHWCA does not, therefore, preempt the statutory employer defense accorded Alumax under South Carolina law.

ARGUMENT

I. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTIONS PRESENTED IN THE PETITION.

A. The first question presented in the petition is as follows:

> "Does §905(a) of the Longshoremen's and Harbor Workers' Act, as amended, which

allows third party actions against general contractors, apply to a longshoreman's action at law resulting from an injury occurring on a pier over navigable waters of the United States or is said section applicable only when the third party tort suit arises under the admiralty jurisdiction of the United States?"

This issue was neither presented nor decided in the court below.

1. The question in this case is not whether section 905(a) applies to a longshoreman's action at law resulting from an injury occurring on a pier, but whether section 905(a) creates a cause of action against a land-based defendant other than an employer who has failed to secure compensation. Unquestionably, section 905(a) does permit a longshoreman to sue his employer at law or in admiralty if his employer fails to secure payment of compensation as required under the Act. However, the case at bar is not an

action against the plaintiff's employer, and the plaintiff's employer, Lemm Corporation-Operations, did secure compensation under the Act, so the applicability of section 905(a) to actions at law is not an issue in this case and was not addressed by the Fourth Circuit

The holding of the Fourth Circuit is narrow: Nothing in the LHWCA, as amended, or its legislative history, purports to prohibit the application of state-created immunity for someone in the position of Alumax (Petition for Certiorari, p. 26A). Even the dissent in the court below acknowledges:

> There is no section of the LHWCA which on its face clearly provides employees with a cause of action against third parties whose fault causes an injury. Only two sections, section 933(a) and section 905(b), could conceivably be interpreted as providing such a cause of action, but an inquiry reveals that Congress did not intend them to do so.

(Petition for Certiorari, pp. 54A and 55A).

Petitioners' complaint with the decision below is not that the court held section 905(a) inapplicable, but that the court did not interpret that section to "allow", or create, a federal cause of action against third parties in the position of Alumax so as to preempt state law which expressly prohibits such an action. The first question presented, in fact, begs the question, because it includes an assumption that section 905(a) creates a cause of action against parties in the position of Alumax.

2. This case does not present the issue whether section 905(a) applies "only when the third party tort suit arises under the admiralty jurisdiction of the United States." Section 905(a) specifically refers to actions "at law or in admiralty," but the lack of admiralty jurisdiction in this case has no bearing upon the applicability of section 905(a).

Alumax claims its immunity under the law of South Carolina, not under section 905(a) of the LHWCA. The fact that this case does not fall within admiralty jurisdiction is

significant only because it makes it clear that the substance of the plaintiffs' cause of action arises out of, and is governed by, state and not federal law.

Section 905(a) is inapplicable to this case not because of the lack of admiralty jurisdiction but because the facts of the case do not invoke the terms of the section. Alumax does not invoke Section 905(a) as the source of its immunity, and the plaintiffs cannot invoke that section because they are not suing an employer who has failed to secure compensation under the Act.

B. The second question presented in the petition is as follows:

> "Does state or federal law govern the rights of a longshoreman injured on a pier over the navigable waters of the United States?"

Federal law unquestionably can govern the compensation rights of a longshoreman injured on a pier, but the case at bar does not raise this question. Mr. Garvin is receiving medical

benefits and compensation under the LHWCA, and his rights to those benefits are indeed governed by federal law.

The court below held only that the substantive law of South Carolina determines the tort liability of a land-based third party to a worker injured on land. The court relied upon Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, reh'g denied, 448 U.S. 916 (1980), in holding that state and federal law operate concurrently with regard to injuries that occur on land but which are connected with longshoring activities. In the present case, the Fourth Circuit concluded that absent a conflict with a specific provision of federal law, state law governs the rights of the parties to a third party tort action arising out of state law. (Petition for Certiorari, pp. 29A-32A).

South Carolina law prohibits suit by an injured worker against his "statutory employer" whether or not the worker elects to receive compensation under the South Carolina act. See S.C. CODE ANN. §§ 42-1-310, 42-1-400, and 42-1-540 (1976); Wardell v.

Richmond Screw Anchor Co., 133 Ga. App. 378, 210 S.E. 2d 854 (1974) (interpreting South Carolina law). Therefore, as a matter of South Carolina law, Alumax is immune from suit even though the plaintiff elected to receive compensation under the LHWCA.

The determinative issue in this case is much narrower than the second question presented by the petitioners. The question in this case is whether the substantive law of South Carolina governs the petitioners' third party action against a land-based defendant arising out an accident which occurred on land in the state of South Carolina, not whether all of an injured longshoreman's rights are governed by state or federal law.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IS NOT IN CONFLICT WITH ANOTHER FEDERAL COURT OF APPEALS ON THE SAME MATTER.

Petitioners assert that the decision of the Fourth Circuit is in conflict with the

decisions of the Fifth Circuit in Jenkins v. McDermott, Inc., 723 F.2d 229 (5th Cir. 1984), vacated, 742 F.2d 191 (1984), and Martin v. Ingalls Shipbuilding, 746 F.2d 231 (5th Cir. 1984). Neither of these decisions presents a conflict with the holding of the Fourth Circuit in this case.

The Fifth Circuit vacated the Jenkins decision, but more importantly, the decision turned upon the apparent right of the claimant under Louisiana law to elect his remedies. See Poche v. Avondale Shipyards, Inc., 339 So. 2d 1212, 1221 (La. 1976) ("We are of the opinion that Adams, having availed himself of the benefits under the [LHWCA], has elected to pursue his remedies under the federal compensation statute."). This issue is not presented in the present case, as it is undisputed that election is prohibited under South Carolina law.

Martin does not present the issue considered or raised in this case. The Martin court appears to have assumed that the state and federal compensation acts could not exist

concurrently. There is no indication that the court was asked to, or did, consider whether under Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, reh'g denied, 448 U.S. 916 (1980), and Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), reh'g denied, 404 U.S. 1064 (1972), provisions of state law could apply even where the plaintiff's compensation claim fell within the jurisdiction of the LHWCA. The Martin decision thus gives no indication of the Fifth Circuit's having considered the issue of supremacy versus coexistence of federal and state law.

If properly presented, the issue involved in the case at bar would undoubtedly be decided by the Fifth Circuit in the same way that it was by the Fourth Circuit, since the Fifth Circuit has held on numerous occasions that the LHWCA does not create a third party cause of action. See, e.g., Christoff v. Bergeron Industries, Inc., 748 F.2d 297 (5th Cir. 1984); Russell v. Atlantic & Gulf Stevedores, Inc., 625 F.2d 71 (5th Cir. 1980); Parker v. South Louisiana Contractors, Inc.,

537 F.2d 113 (5th Cir. 1976), reh'g denied, 539 F.2d 710, cert. denied, 430 U.S. 906 (1977) (See dissent in the court below, Petition for Certiorari, pp. 61A and 62A).

The supposed inter-circuit conflict which the petitioners perceive is not ripe for determination by this Court. Though the lower courts have explored a number of issues spawned by Sun Ship pertaining to the interplay between state compensation acts and the LHWCA, the courts have not yet addressed the extent to which the LHWCA preempts substantive state law in third party suits arising under state law. Intervention at this time by this Court would be premature.

III. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DOES NOT DECIDE A FEDERAL QUESTION IN A WAY IN CONFLICT WITH A STATE COURT OF LAST RESORT.

The petitioners assert that the decision of the Fourth Circuit is in confict with the

decision of the Supreme Court of Alabama in Fillinger v. Foster, 448 So. 2d 321, cert. denied, _____ U.S. _____, 105 S.Ct. 223 (1984). In point of fact, however, the Fillinger decision is in complete harmony with the decision of the court of appeals in the case at bar.

In Fillinger the plaintiff was injured while working as a shipbuilder in a land-based operation within the jurisdiction of the LHWCA. He sued his fellow employee, which is permitted under Alabama law. The Alabama Supreme Court ruled that section 933(i) of the LHWCA, which specifically prohibits suits against fellow employees, preempts inconsistent state law. In Fillinger the state law permitted suit where section 933(i) of the LHWCA expressly prohibited it. Thus, a direct and unavoidable conflict existed, and federal law, of course, prevailed.

In the case at bar, by contrast, state law grants immunity to one in the position of Alumax, whereas federal law does not create such immunity. As the Fourth Circuit

correctly observed, nothing in the federal law evinces an attempt by Congress to prohibit the states from granting such immunity in an action arising under state law (Petition for Certiorari, pp. 31A-32A).

IV. THE PETITION DOES NOT PRESENT A SPECIAL OR IMPORTANT QUESTION.

Petitioners argue that the Petition should be granted "because Congress has made clear that it intends general contractors to be subject to actions at law in the circumstances of this case." (Petition for Certiorari, p. 12). In support of that argument, petitioners rely upon the 1984 amendments to the LHWCA overruling this Court's decision in Washington Metropolitan Area Transit Authority v. Johnson, 467 U.S. 925 (1984) (WMATA).

In WMATA this Court construed the LHWCA to grant immunity to all general contractors except in those instances where both the subcontractor and the general contracor had failed to secure compensation for the injured employee. The 1984

amendments to the LHWCA expressly reject this interpretation and confer immunity upon the general contractor only if the subcontractor has in fact defaulted on its obligation to secure compensation and the general contractor has secured such compensation.

Nothing in the amendments, however, precludes state law from granting immunity to one in the position of Alumax, i.e., a land-based defendant which is being sued under South Carolina state tort law for an injury sustained on a pier, an extension of land. In fact, the 1984 amendments support the view that the immunity provisions of the LHWCA are not intended to preempt immunities created by state law, since the amendments left intact this Court's decision in Sun Ship v. Pennsylvania, 447 U.S. 715, reh'g denied, 448 U.S 916 (1980), and Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), reh'g denied, 404 U.S. 1064 (1972).

The immunity provisions of the South Carolina Workers' Compensation Law are not

repugnant to those in the LHWCA because, as the Fourth Circuit pointed out, the LHWCA is silent with regard to a party in the position of Alumax (Petition for Certirorari, p. 27A). The 1984 amendments make it clear that this is in fact the case. The definition of "employer" in Section 905(a) of the LHWCA is intended to limit only the immunity granted by the Act, and it is not intended to apply to other statutory schemes such as the South Carolina Workers' Compensation Law.

The amendment to section 905(a) provides: "For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure payment of compensation as required by section 4." (Emphasis added). Thus, while it is now true that the LHWCA grants immunity only to those general contractors who have been required to secure compensation in lieu of defaulting subcontractors, it is now also clear that this restriction applies only to the immunity conferred by section 905(a).

The petitioners have never been able to point to any provision of the LHWCA which purports to preclude the states from granting immunity to one in the position of Alumax. This is not surprising, however, since the LHWCA creates a right to sue only two classes of third parties: shipowners (Section 905(b)) and employers who have failed to secure compensation (Section 905(a)). Alumax falls into neither of these classes, and the grant of immunity to it under the law of South Carolina is therefore not repugnant to the LHWCA.

The issue in this case is simply whether state law may create a defense or an immunity in an action arising under state law, where the LHWCA does not create such a defense or immunity and does not expressly or by implication prohibit state law from doing so.

This Court held in Ferri v. Ackerman, 444 U.S. 1983 (1979), that when state law creates a cause of action, the state is free to define the defenses to the claim, including the defense of immunity, unless the state rule is in

direct conflict with federal law. In Victory Carriers, Inc., v. Law, supra, this Court held that a third-party action founded on state law is a creature of state law and is to be governed by it. In Sun Ship Inc., v. Pennsylvania, supra, this Court held that differing provisions of state compensation acts and the LHWCA can coexist as long as there is not a direct conflict.

The Fourth Circuit relied upon its earlier decision in Holland v. Sea-Land Services, 655 F.2d 556 (4th Cir. 1981), wherein it had held that tort suits arising out of accidents occurring on piers have traditionally been reserved for state law. This Court denied certiorari in that case, 455 U.S. 919 (1982). The Fifth Circuit held in Parker v. South Louisiana Contractors, Inc., 537 F.2d 113 (5th Cir. 1976), that the LHWCA does not create a federal cause of action against third parties. This Court denied certiorari in that case as well, 430 U.S. 906 (1977).

The issue presented in the case at bar affects relatively few people, as reflected by

the dearth of reported opinions on the issue. The only cases involving the issue are those arising on land, within the concurrent jurisdiction of state workers' compensation acts and the LHWCA, where third-party suits have been brought against land-based defendants alleging state law causes of action.

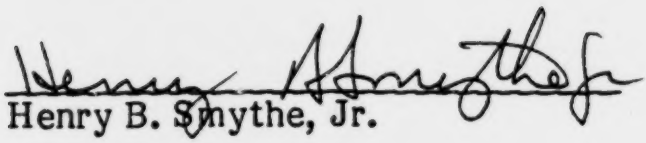
A decision by this Court on the issue presented in this case would not contribute to uniformity in application of the LHWCA. This case does not in any way involve the compensation rights of longshoremen. As the Fourth Circuit noted, Congress has diligently attempted to preserve state law governance of third-party claims by recipients of LHWCA compensation (Petition for Certiorari, p. 31A). It is the longshormen's compensation remedy, and not the law governing their state law suits against third parties, which Congress has sought to make uniform through the LHWCA. Millspaugh v. Port of Portland, 65 Ore.App. 389, 671 P.2d 743, 745-45 (1983), pet. for rev. denied, 296 Or. 411, 675 P.2d 493 (1984). See also Sun Ship, supra, 447 U.S. at 721-22.

The underpinnings of the decision below are well-established principles of federalism. This Court has frequently admonished against finding conflicts between federal and state law where none clearly exist, and neither the majority nor the dissent in the court below could derive from either the letter or the legislative history of the LHWCA a congressional intent to displace substantive state tort law in land-based third- party actions brought by land-based workers.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted.



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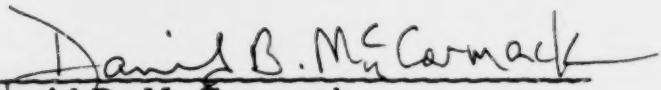

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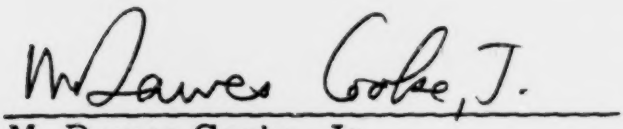

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